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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT MCCOY DAYE,

Defendant and Appellant.

H026810

(Santa Clara County

Super. Ct. No. FF202132)

Appellant molested his girlfriend's daughter, forcing her to have intercourse with him. Nine months later she gave birth to his child. A jury convicted appellant of one count of forcible lewd act on a child under the age of 14 and found true an allegation that appellant had inflicted great bodily injury on the victim. (Pen. Code, §§ 288, subd. (b)(1), 667.61, subds. (b) & (e), 12022.7.) The trial court sentenced appellant to a state prison term of 15 years to life.

Appellant contends the great bodily injury enhancement should be reversed "because the evidence was insufficient to show that the pregnancy and attendant pains associated with it were caused by [the] underlying sexual assault." We affirm.

**Evidence at Trial**

F., who was 18 at the time of trial, testified that appellant was her mother's former boyfriend. F. had known appellant since she was two and living in Philadelphia. When

F. was six or seven years old, appellant began molesting her. When F. was 12, she moved with her mother, her brother, and appellant to California. F. and her family lived in various places, including an apartment and a labor camp. Appellant continued to molest her, including having intercourse with her, although he had fewer opportunities to do so during the times he was not actually living with the family.

The family moved, without appellant, to an apartment in a "living center for low-income people" in San Martin. Appellant assaulted F. "just a couple" of times there when F. was 12 or 13. F. described in detail an act of forcible intercourse that was her last incident of sexual contact with appellant. F. bled from her vagina for two or three days after this attack. Eight-and-a-half to nine months later and two weeks after F.'s fourteenth birthday, F. gave birth to a child she named "Dayeshawn." F. testified that, at the time Dayeshawn was born, she believed her boyfriend was the father of her child because appellant and F.'s mother had "been together for about 11 years, and she had never used birth control, and she never conceived a child."

When Dayeshawn was about two years old, F.'s boyfriend wanted a paternity test because the "people from Welfare" sent him a letter "saying that he had to pay the back child support for the money that they were giving" F. and Dayeshawn. When the results of this test excluded F.'s boyfriend from being Dayeshawn's father, F. "automatically knew" that appellant was the child's father and subsequent testing confirmed this.

### **Great Bodily Injury Enhancement**

Appellant contends that the great bodily injury enhancement should be reversed "because the evidence was insufficient to show that the pregnancy and attendant pains associated with it were caused by [the] underlying sexual assault." Appellant "does not challenge the notion that the pains of pregnancy and labor can constitute great bodily injury." He argues, "the evidence was insufficient to show that this last reported sexual assault was the cause of the pregnancy and the great bodily injury associated with it. While the prosecution may have *made it seem* that the last incident of sexual molestation

resulted in the pregnancy, that was nothing more than a suggestion." Appellant argues that the issue here is a "purely legal" one: "When the prosecution evidence showed that appellant committed multiple sexual assaults, did the prosecution sufficiently prove a nexus between a particular assault it chose to prove and a pregnancy?"

"It is well settled that the determination of great bodily injury is essentially a question of fact, not of law. ' " . . . If there is sufficient evidence to sustain the jury's finding of great bodily injury, we are bound to accept it, even though the circumstances might reasonably be reconciled with a contrary finding." ' " (*People v. Escobar* (1992) 3 Cal.4th 740, 750.)

The information charged that appellant committed the sexual assault between the dates of May 17, 1998 and September 17, 1998. Dayeshawn was born March 17, 1999, approximately nine months after the assault F. described in detail. Evidence of other molests was admitted pursuant to Evidence Code section 1108. F. did not testify as to when the other molest in the San Martin apartment occurred. She testified only that she lived in the San Martin apartment when she was 12 or 13 and that appellant molested her there "just a couple" of times. Appellant argues that if "appellant had raped F[.] a week before the incident she described in detail, there is no reason to think that that contact was not the cause of the pregnancy." "[A]ppellant submits that there was a 'disconnect' between the prosecution's proof of the sexual assault and the attendant great bodily injury enhancement."

The evidence established that appellant raped F. approximately nine months before F. gave birth to appellant's child. Although there was evidence that appellant raped F. earlier than that during the time she lived in the San Martin apartment, there was no evidence that the earlier rape occurred at a time that could have explained the pregnancy. Thus, there is no evidence to support appellant's speculation that Dayeshawn was conceived during the earlier rape. The evidence established that the rape the prosecution chose to prove occurred nine months before a full-term birth. This is

substantial evidence that the rape caused the pregnancy that formed the basis of the great bodily injury enhancement.

**Disposition**

The judgment is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.